

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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THE BANK OF NEW YORK MELLON  
FKA THE BANK OF NEW YORK AS  
TRUSTEE FOR THE REGISTERED  
HOLDERS OF THE CWABS, INC.,  
ASSET-BACKED CERTIFICATES,  
SERIES 2005-13,<sup>1</sup>

Plaintiff,

v.

NEVADA ASSOCIATION SERVICES, *et*  
*al.*,

Defendants.

Case No. 2:16-cv-02400-MMD-VCF

ORDER

**I. SUMMARY**

This dispute arises from the homeowners' association foreclosure sale ("HOA Sale") of real property located at 5513 Oakwood Ridge Street, Las Vegas, Nevada 89130 ("Property") to satisfy a homeowners' association lien. (See, e.g., ECF No. 1 at 2-7.) The Court previously entered judgment in Plaintiff Ditech Financial LLC's favor against Defendant Northgate Homeowners Association (the "HOA") per a stipulated judgment between those parties. (ECF No. 58.) In addition, on Plaintiff's motion (ECF No. 59), the

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<sup>1</sup>Plaintiff the Bank of New York Mellon fka The Bank of New York as Trustee for the Registered Holders of the CWABS, Inc., Asset-Backed Certificates, Series 2005-13 filed an unopposed motion to substitute in place of Ditech Financial LLC. (ECF Nos. 75 at 1 ("Defendant Maria Loyo-Morales does not oppose the motion."), 82 (confirming non-opposition).) Plaintiff explains in the motion that Ditech Financial LLC assigned the pertinent deed of trust to Plaintiff in July 2019, after the Court entered judgment in this case. (ECF No. 75 at 2.) Plaintiff also attached supporting documentation to its motion. (ECF Nos. 75-1, 75-2.) The Court will grant the motion. (ECF No. 75.) See *also* *GMAC Mortg., LLC v. Nevada Ass'n Servs., Inc.*, Case No. 2:13-cv-01157-GMN-NJK, 2018 WL 487101, at \*1 (D. Nev. Jan. 5, 2018) (granting unopposed motion to substitute following assignment of deed of trust in similar case). The Court will also direct the Clerk of Court to update the docket accordingly.

1 Court entered default judgment against Defendants Nevada Association Services, Inc.  
 2 (“NAS”), Maria Loyo-Morales and Kimberly Tiboni, and closed the case. (ECF Nos. 64,  
 3 65.) Before the Court are two motions seeking either a temporary restraining order or a  
 4 preliminary injunction (ECF Nos. 67, 69 (collectively, the “Motions”)),<sup>2</sup> in which Loyo-  
 5 Morales seeks to stop another foreclosure sale set for June 15, 2021 (ECF No. 74), and  
 6 more generally prevent Plaintiff from foreclosing on the Deed of Trust (“DOT”) it owns on  
 7 the Property. Because Loyo-Morales has not shown she is entitled to the extraordinary  
 8 remedy of preliminary injunctive relief, particularly because she cannot prevail on the  
 9 merits of any quiet title claim she may bring,<sup>3</sup> and as further explained below, the Court  
 10 will deny the Motions. Also before the Court is Loyo-Morales’ motion to set aside the  
 11 default judgment the Court entered against her.<sup>4</sup> (ECF No. 68 (“Set Aside Motion”).)  
 12 Because the HOA Sale was void because it violated the automatic bankruptcy stay, and  
 13 as further explained below, the Court will also deny the Set Aside Motion.

## 14 **II. BACKGROUND**

15 The Court incorporates by reference its findings of fact in the default judgment and  
 16 does not recite those underlying facts here. (ECF No. 65 at 2-3.) Plaintiff filed this case in  
 17 October 2016. (ECF No. 1.) According to the executed summons filed by Plaintiff, Plaintiff  
 18 served Loyo-Morales by leaving it with Sabrina Zrales at the Property on October 20,  
 19 2016. (ECF No. 11 at 2.) Loyo-Morales states that Zrales was her tenant at the time.  
 20 (ECF No. 67-1 at 3.) Plaintiff next mailed a copy of its notice of intent to take default against  
 21 Loyo-Morales to the Property on November 16, 2016. (ECF No. 16 at 3.) Plaintiff then filed  
 22 a notice of default against Loyo-Morales on December 19, 2016 and again sent a copy to  
 23 Loyo-Morales at the Property. (ECF No. 22.) On Plaintiff’s motion (ECF Nos. 23, 24), the  
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25  
 26 <sup>2</sup>The Court will consider and refer to the Motions collectively herein.

27 <sup>3</sup>She has not actually filed a counterclaim, necessitating the hypothetical phrasing.

28 <sup>4</sup>Plaintiff filed a response (ECF No. 79), and Loyo-Morales filed a reply (ECF No. 81).

1 Clerk of Court entered a default against Loyo-Morales—along with NAS and Tiboni—on  
2 December 20, 2016. (ECF No. 25.)

3 In January 2017, Plaintiff voluntarily dismissed Tiboni (ECF No. 26), and then filed  
4 a motion for summary judgment (ECF No. 28) seeking an order that the HOA Sale was  
5 void, and Plaintiff's DOT continued to encumber the Property. Plaintiff's lead argument in  
6 that motion was that the HOA Sale was void because it occurred during Tiboni's  
7 bankruptcy proceedings, and thus violated the automatic stay imposed by those  
8 bankruptcy proceedings. (*Id.* at 3.) The HOA was the only party that filed a response to  
9 that motion (ECF No. 36), and Plaintiff filed a reply (ECF No. 37).

10 However, Plaintiff reached a settlement on its primary quiet title claim with the HOA  
11 before the Court ever ruled on Plaintiff's summary judgment motion. (ECF No. 54.) As part  
12 of the settlement, Plaintiff and the HOA submitted a stipulated judgment for the Court's  
13 review. (ECF No. 56.) The Court entered the stipulated judgment (ECF No. 58), and  
14 accordingly denied the pending summary judgment motion as moot (ECF No. 57). The  
15 stipulated judgment stated that Plaintiff's DOT on the Property survived the HOA Sale.  
16 (ECF No. 58 at 3.) It also stated that Plaintiff's DOT is a first position DOT on the Property  
17 "as against all other claimants." (*Id.*)

18 Shortly thereafter, Plaintiff moved for default judgment against Loyo-Morales,  
19 Tiboni, and NAS. (ECF No. 59.) No responses were filed to that motion, and the Court  
20 granted the motion in June 2018. (ECF Nos. 64, 65.) As part of the default judgment, the  
21 Court entered findings of fact and conclusions of law. (ECF No. 65.) In pertinent part, the  
22 Court's conclusions of law state that the HOA Sale was void because it violated the  
23 automatic bankruptcy stay as to Tiboni. (*Id.* at 4.) The Court thus found that Plaintiff's DOT  
24 continued to encumber the Property. (*Id.*) The Court entered judgment accordingly, in  
25 Plaintiff's favor. (*Id.* at 6.)

26 Loyo-Morales filed the Motions and Set Aside Motion nearly three years later. (ECF  
27 Nos. 67, 68, 69.) The Court declined to consider the Motions on an ex parte basis because  
28 Plaintiff failed to comply with Local Rules LR IA 7-2(b) and LR 7-4, but nonetheless set an

1 expedited briefing schedule. (ECF No. 70.) Per the Court's briefing schedule for the  
 2 Motions, Plaintiff filed responses (ECF Nos. 77, 78), and Loyo-Morales filed a combined  
 3 reply (ECF No. 80).

### 4 **III. LEGAL STANDARDS**

5 As to the Motions, Federal Rule of Civil Procedure 65 governs preliminary  
 6 injunctions. "An injunction is a matter of equitable discretion' and is 'an extraordinary  
 7 remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such  
 8 relief.'" *Earth Island Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010) (quoting *Winter v.*  
 9 *Nat. Res. Def. Council*, 555 U.S. 7, 22, 32 (2008)). This relief is "never awarded as of  
 10 right." *Alliance for the Wild Rockies v. Cottrell* ("*Alliance*"), 632 F.3d 1127, 1131 (9th Cir.  
 11 2011) (citation omitted). To qualify for a preliminary injunction, a plaintiff must satisfy four  
 12 requirements: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm;  
 13 (3) that the balance of equities favors the plaintiff; and (4) that the injunction is in the public  
 14 interest. See *Winter*, 555 U.S. at 20. Temporary restraining orders are governed by the  
 15 same standard applicable to preliminary injunctions. See *Stuhlbarg Int'l Sales Co. v. John*  
 16 *D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001).

17 As to the Set Aside Motion, Rule 55(c) of the Federal Rules of Civil Procedure  
 18 provides that the Court "may set aside a final default judgment under Rule 60(b)." Fed. R.  
 19 Civ. P. 55(c). "The 'good cause' standard that governs vacating an entry of default under  
 20 Rule 55(c) is the same standard that governs vacating a default judgment under Rule  
 21 60(b)." *Franchise Holding II, LLC. v. Huntington Restaurants Grp., Inc.*, 375 F.3d 922, 925  
 22 (9th Cir. 2004). In determining whether good cause exists, the Court considers three  
 23 factors: "(1) whether the plaintiff will be prejudiced, (2) whether the defendant has a  
 24 meritorious defense, and (3) whether culpable conduct of the defendant led to the default."  
 25 *Brandt v. Am. Bankers Ins. Co. of Fla.*, 653 F.3d 1108, 1111 (9th Cir. 2011) (quoting *Falk*  
 26 *v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984)). These factors are disjunctive. See *id.* Thus,  
 27 the Court may refuse to set aside default if it finds that any one of these three factors is  
 28

1 true. See *U.S. v. Signed Pers. Check No. 730 of Yubran S. Mesle*, 615 F.3d 1085, 1091  
 2 (9th Cir. 2010).

### 3 **IV. DISCUSSION**

4 The Court first addresses the Motions, and then addresses the Set Aside Motion.

#### 5 **A. The Motions**

6 While Loyo-Morales only addresses two of the *Winters* factors in her Motions, the  
 7 Court attempts to address all four.

#### 8 **1. Likelihood of Success on the Merits**

9 Loyo-Morales argues she is likely to succeed on the merits because she was never  
 10 properly served in this case, which prevented her from filing a quiet title counterclaim that  
 11 she argues she is likely to prevail on were she to file it because the HOA Sale  
 12 presumptively extinguished the DOT. (ECF No. 67 at 8.) Plaintiff counters that Loyo-  
 13 Morales was properly served, and she is unlikely to prevail on the merits of a quiet title  
 14 counterclaim (if she filed one) because the HOA Sale violated the automatic bankruptcy  
 15 stay as to Tiboni, Tiboni tendered the superpriority amount prior to the HOA sale, tender  
 16 would have been futile in any event because the HOA's agent NAS had a policy of  
 17 rejecting tender, and any claim Loyo-Morales were to assert would be barred by judicial  
 18 estoppel. (ECF No. 77 at 6-11.) The Court agrees with Plaintiff the HOA Sale violated the  
 19 automatic bankruptcy stay, as it previously found in the default judgment it entered in this  
 20 case.<sup>5</sup>

21 Beginning with the service arguments, Plaintiff's predecessor-in-interest Ditech  
 22 properly served Loyo-Morales by personally serving her long-term tenant at the Property.  
 23 (ECF No. 11 at 2.) Under Fed. R. Civ. P. 4(e)(2)(B), a plaintiff may properly serve a  
 24 defendant by leaving a copy of the summons and the complaint with "at the individual's  
 25 dwelling or usual place of abode with someone of suitable age and discretion who resides  
 26

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27 <sup>5</sup>The Court therefore need not—and does not—address Plaintiff's remaining  
 28 arguments as to why any counterclaim filed by Loyo-Morales would not succeed on the  
 merits. (ECF No. 77 at 7-11.)

1 there[.]” While it appears Loyo-Morales has multiple houses, she listed the Property as  
2 her residence in her bankruptcy petition filed in January 2020. (ECF No. 77-20 at 3.)<sup>6</sup> This  
3 contradicts her statement in her declaration filed with the Motions in May 2021 that she  
4 moved into the Property for the first time approximately two months prior. (ECF No. 69-1  
5 at 3.) This contradiction makes it difficult to say when she moved into the Property but  
6 suggests to the Court that the Property is one of her dwellings, and thus may properly be  
7 considered her dwelling for purposes of Fed. R. Civ. P. (4)(e)(2). *See Stars’ Desert Inn*  
8 *Hotel & Country Club, Inc. v. Hwang*, 105 F.3d 521, 524 (9th Cir. 1997) (noting that a  
9 person may have more than one dwelling in affirming the district court’s finding that service  
10 was proper based on evidence the defendant was living at a particular address in granting  
11 the plaintiff’s request for a default judgment).

12 Moreover, Loyo-Morales does not actually argue that her tenant that Ditech served,  
13 Sabrina Zrales, is not “someone of suitable age and discretion[.]” (ECF Nos. 67, 69.)  
14 Loyo-Morales merely repeatedly points out that Zrales is not Loyo-Morales but instead is  
15 her tenant. Neither of these attributes suggest that Zrales is not “someone of suitable  
16 age and discretion[.]” Fed. R. Civ. P. (4)(e)(2). For its part, Plaintiff suggests that Zrales  
17 is someone of suitable age and discretion. (ECF Nos. 77 at 6, 79 at 6-7.) While Plaintiff  
18 does not offer any evidence to support this assertion, the Court can easily conclude that  
19 Zrales is someone of “someone of suitable age and discretion” in the absence of any  
20 argument or evidence to the contrary. Ditech properly served Loyo-Morales under Fed. R.  
21 Civ. P. (4)(e)(2).

22 But even setting the service arguments aside, Loyo-Morales is unlikely to prevail  
23 on the merits because the HOA Sale violated the automatic bankruptcy stay as to Tiboni  
24 and was therefore void. *See LN Management LLC Series 5105 Portraits Place v. Green*  
25 *Tree Loan Servicing*, 399 P.3d 359, 360-61 (Nev. 2017) (holding that an HOA foreclosure  
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27 <sup>6</sup>The Court takes judicial notice of this document filed in the U.S. Bankruptcy Court  
28 for the District of Nevada. *See Harris v. Cty. of Orange*, 682 F.3d 1126, 1132 (9th Cir.  
2012) (taking judicial notice of “documents on file in federal” court).

1 sale held in violation of an automatic bankruptcy stay is void). It is indeed odd that Loyo-  
 2 Morales does not even refer to, or attempt to argue around, the automatic bankruptcy stay  
 3 in her Motions considering that the Court expressly mentioned this reason for finding the  
 4 HOA Sale void in the default judgment it entered in this case. (ECF Nos. 67, 69; *see also*  
 5 ECF No. 65 at 4 (stating the violation of the bankruptcy stay rendered the HOA Sale void  
 6 in the default judgment against Loyo-Morales).) And while Loyo-Morales addresses the  
 7 automatic stay for the first time in her reply (ECF No. 80 at 6-7), contrary to her arguments,  
 8 the HOA Sale was void even though the actual HOA Sale occurred after Tiboni's  
 9 bankruptcy was discharged—because the HOA recorded the notice of default and election  
 10 to sell during Tiboni's bankruptcy. (ECF Nos. 77-7, 77-8, 77-9 (establishing that the HOA  
 11 recorded the notice of delinquent assessment lien and notice of default before the  
 12 bankruptcy court entered its final decree and closed Tiboni's bankruptcy case).) *See also*  
 13 *Premier One Holdings, Inc. v. Bank of New York Mellon for Certificate Holders of the*  
 14 *CWABS, Inc.*, 401 P.3d 1145 (Table), 2017 WL 4158138, at \*1 (Nev. 2017) (“because the  
 15 HOA recorded its notice of default at a time when the subject property was protected by  
 16 the automatic stay, the recording of that notice had no legal effect”) (citation omitted). The  
 17 Court accordingly concludes that Loyo-Morales is unlikely to prevail on the merits of any  
 18 quiet title counterclaim she might file.

## 19 **2. Irreparable Harm**

20 Plaintiff argues she will be irreparably harmed if Plaintiff proceeds with the  
 21 scheduled foreclosure sale on its DOT because property is unique, she is now living in the  
 22 Property, and she will be unable to live there, or profit from the Property, if the foreclosure  
 23 sale proceeds as scheduled. (ECF No. 67 at 8-9.) However, this argument is unpersuasive  
 24 because it ignores the fact that Plaintiff's DOT continues to encumber the Property per the  
 25 Court's default judgment—and as affirmed above. Thus, the foreclosure sale is a result of  
 26 Plaintiff's nonpayment of the mortgage on the Property. This factor therefore does not  
 27 weigh in Plaintiff's favor even if Loyo-Morales had established she was likely to prevail on  
 28 the merits, and she has not.



### 3. Remaining Factors

Loyo-Morales does not address the remaining factors in her Motions. (ECF Nos. 67, 69.) The Court accordingly has no reason to assume they favor granting her Motions, especially considering the Court's finding that she is unlikely to prevail on the merits of any potential quiet title counterclaim she may file.

In sum, the *Winters* factors do not weigh in favor of granting the Motions. The Court will deny the Motions.

#### B. The Set Aside Motion

The Court will also deny the Set Aside Motion for the same reasons provided *supra* in Section IV.A.1 discussing Loyo-Morales' likelihood of success on the merits. To summarize, she was properly served, but even if she was not, the HOA Sale was void because it violated the automatic bankruptcy stay as to Tiboni. As the only arguments Loyo-Morales makes in her Set Aside Motion are that she was improperly served and the HOA Sale presumptively extinguished Plaintiff's DOT—but neither argument is persuasive—Loyo-Morales has not shown good cause for the Court to set aside the default judgment it previously entered. Indeed, the Court confirmed *supra* that the primary basis for the default judgment it previously entered in this case—that the HOA Sale was void because it violated the automatic bankruptcy stay—was correct.

Turning to the *Falk* factors, they do not support setting aside the default judgment either. As to the first factor, Plaintiff would be prejudiced if the Court set aside the default judgment because it would be unable to proceed with the upcoming, scheduled foreclosure sale. Second, Loyo-Morales does not have a meritorious defense because the HOA Sale violated the automatic bankruptcy stay as to Tiboni. And because the *Falk* factors are disjunctive, and two of them do not favor setting the default judgment aside, the Court need not address the third. See *Brandt*, 653 F.3d at 1111. In sum, the Court will also deny the Set Aside Motion.

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**V. CONCLUSION**

The Court notes that the parties made several arguments and cited to several cases not discussed above. The Court has reviewed these arguments and cases and determines that they do not warrant discussion as they do not affect the outcome of the issues before the Court.

It is therefore ordered that Defendant Maria Loyo-Morales' motion for a preliminary injunction (ECF No. 67) is denied.

It is further ordered that Defendant Maria Loyo-Morales' motion to set aside the default judgment entered against her (ECF No. 68) is denied.

It is further ordered that Defendant Maria Loyo-Morales' motion for a temporary restraining order (ECF No. 69) is denied.

It is further ordered that Plaintiff's unopposed motion to substitute (ECF No. 75) is granted.

The Clerk of Court is directed to replace Plaintiff Ditech Financial LLC on the docket with The Bank of New York Mellon fka The Bank of New York as Trustee for the Registered Holders of the CWABS, Inc., Asset-Backed Certificates, Series 2005-13.

This case will remain closed.

DATED THIS 14<sup>th</sup> Day of June 2021.

A handwritten signature in blue ink, appearing to read 'Miranda M. Du', is written over a horizontal line.

MIRANDA M. DU  
CHIEF UNITED STATES DISTRICT JUDGE